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91-182

Supreme Court, U.S.

FILED

JUL 2 1991

OFFICE OF THE CLERK

NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

JOSEPH M. WARD

PETITIONER

V

ROY H. PARK BROADCASTING CO.,
INC. AND ROY HARDEE

RESPONDENTS*

PETITION FOR WRIT OF CERTIORARI TO
THE NORTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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*See page iv regarding other parties
to this action (none of whom have
been involved in any of the appeals).

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE TRIAL COURT'S ENTRY OF SUMMARY JUDGEMENT AGAINST THE PETITIONER, BASED IN PART ON ABSOLUTE PRIVILEGE AS TO TWO NEWS REPORTS, AND/OR THE AFFIRMATION OF THE SUMMARY JUDGEMENT BY THE NORTH CAROLINA COURT OF APPEALS, AND/OR THE DISMISSAL OF THE PETITIONER'S APPEAL TO THE SUPREME COURT OF NORTH CAROLINA FOR LACK OF A SUBSTANTIAL CONSTITUTIONAL QUESTION VIOLATE THE PETITIONER'S RIGHT TO BE PROTECTED FROM FALSE DEFAMATION BY THE MEDIA, PURSUANT TO ARTICLE I, SECTION 14 OF THE NORTH CAROLINA CONSTITUTION AND THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, AND/OR DENY HIS RIGHT TO A CLAIM (S) RECOGNIZED UNDER NORTH CAROLINA LAW AND THEREBY DENY HIM HIS RIGHT TO DUE PROCESS OF LAW AND/OR EQUAL PROTECTION OF THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

II. DOES THE TRIAL COURT'S ENTRY OF SANCTIONS (INCLUDING \$13,450 IN ATTORNEY'S FEES) AGAINST THE PETITIONER FOR HAVING SIGNED AN AMENDED COMPLAINT FOUND TO BE SPURIOUS, WITHOUT FOUNDATION AND A SHAM UPON THE COURT (THE SAME COMPLAINT UPON WHICH THE SUMMARY JUDGEMENT REFERRED TO UNDER QUESTION I HEREINABOVE WAS ENTERED) AND/OR THE AFFIRMATION OF THE SANCTIONS BY THE NORTH CAROLINA COURT OF APPEALS AND/OR THE DISMISSAL OF THE PETITIONER'S APPEAL TO THE SUPREME COURT OF NORTH CAROLINA SEEKING RELIEF FROM THE SANCTIONS DENY THE PETITIONER HIS RIGHT TO DUE PROCESS OF LAW AND/OR EQUAL PROTECTION UNDER THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

III. DOES THE TRIAL COURT'S DETERMINATION THAT THE PETITIONER HAD RESTED HIS CASE BEFORE HE FILED HIS NOTICE OF VOLUNTARY DISMISSAL, WITHOUT PREJUDICE, OF ALL OF HIS CLAIMS AGAINST THE RESPONDENTS AND/OR THE AFFIRMATION OF THAT RULING BY THE NORTH CAROLINA COURT OF APPEALS AND/OR THE DISMISSAL OF THE PETITIONER'S APPEAL TO THE SUPREME COURT OF NORTH CAROLINA SEEKING RELIEF FROM THAT RULING DENY THE PETITIONER HIS RIGHT TO DUE PROCESS AND/OR EQUAL PROTECTION OF THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

Capital-Cities-ABC, Ned Warwick and Willis Talton became defendants in this action at the time the Complaint was filed. On April 11, 1988, the Petitioner dismissed all of his claims against Defendants Capital-Cities-ABC and Ned Warwick without prejudice. That left in place a counterclaim of those defendants, pursuant to N.C. Gen. Stat. 6-21 seeking attorneys fees. The counterclaim has never been resolved. On June 3, 1988, the Petitioner dismissed all of his claims against Defendant Willis Talton without prejudice (thereby terminating the action between the Petitioner and that Defendant).

None of the above named defendants have been actively involved as to the Petitioner's appeals in this action.

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REFERENCE TO OFFICIAL AND
UNOFFICIAL REPORTS OF OPINIONS
DELIVERED IN THIS CASE BY OTHER COURTS

Interlocutory Summary Judgement against the Petitioner was entered by an Order of Pitt County (N.C.) Superior Court. Sanctions, including \$13,500 in attorney's fees, were entered later against the Petitioner by the same court, pursuant to Rule 11 (a) of the North Carolina Rules of Civil Procedure. After the Petitioner appealed, the same court (but a different judge) entered an order dismissing the Petitioner's appeal from the entry of summary judgement as being not in time. The North Carolina Court of Appeals later entered an opinion finding that the Petitioner had entered his notice of appeal from the Summary Judgement in time. That Court deferred its decision as to the appropriateness of the entry of sanctions and remanded the case to allow

the parties to prepare a new record on appeal and briefs on the questions presented. After those tasks were accomplished, the North Carolina Court of Appeals in an unpublished Opinion (not to be given consideration in other cases) affirmed the entry of summary judgement and the entry of sanctions. The North Carolina Supreme Court later issued an Order dismissing the Petitioner's appeal and denying his Petition For Discretionary Review. See Appendix, pp 9-13, 14-18, 19-56:

STATEMENT OF THE GROUNDS ON
WHICH JURISDICTION OF THIS COURT
IS INVOKED

The Petitioner seeks review of the Order of the Supreme Court of North Carolina entered in this action on April 5, 1991, the Opinion of the North Carolina Court of Appeals entered on February 5, 1991, the Order entered in Pitt County (N.C.) Superior

Court on June 10, 1988 (entering sanctions against the Petitioner) and the Order entered in the same court on January 22, 1988 (entering summary judgement against the Petitioner). No order respecting a rehearing was entered and no order or extension of time to file a petition for a writ of certiorari was entered. The Petitioner believes that Article 3 of the United States Constitution and the 1st, 5th, and 14th Amendments of the United States Constitution confer this Court jurisdiction to review the Orders and the Opinion in question; as do Sections 1981 and 1982 of 42 U.S.C. and Section 1983 of 42 U.S.C. (by providing for relief under its "other proper proceedings for redress" clause.)

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED IN THIS CASE

The following constitutional provisions and statutes are involved in this case.

(a) The 1st Amendment of the United States Constitution which states as follows:

Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances.

(b) The 5th Amendment of the United States Constitution, the pertinent portion of which states as follows:

No person shall * * be deprived of life, liberty, or property without due process of law * *.

(c) Section 1 of the 14th Amendment of the United States Constitution, the pertinent portion of which states as follows:

**No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

(d) Article 1, Section 14 of the Constitution of North Carolina which states as follows:

Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

(e) North Carolina General Statute 1A-1, Rule 11 (a), the pertinent portion of which states as follows:

**The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument

for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ** If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(f) North Carolina General Statute 1A-1, Rule 41 (a)(1), the pertinent portion of which states as follows:

** Subject to the provisions of Rule 23 (c) and of any statute of this State, an action or claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. **

(g) North Carolina General Statute 1A-1, Rule 56 (c), the pertinent portion of which states as follows:

** The judgement sought shall be rendered forewith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgement as a matter of law. **

STATEMENT OF THE CASE

(a) Statement of Proceedings:

This action, originally complaining of false defamation and interference with personal property rights, was filed on December 17, 1986. An Amended Complaint was filed February 10, 1987. The Respondents filed their Answer and their Amended Answer in time. The Respondents filed a counterclaim seeking to recover all amounts expended by them in defense of this proceeding, pursuant to N.C. Gen. Stat. 6-21.5. The Petitioner

filed a counterclaim complaining of interference with contract (s). A constitutional issue as to the rights of the Petitioner and the Respondents pursuant to the 1st Amendment of the United States Constitution was raised by the Petitioner alleging actual malice on the part of the Respondents in his complaint. Record, pp 12-14. Appendix, pp 73-74, 76-77 (paragraphs 26, 32). The Respondents denied actual malice and pled qualified privilege and "First Amendment" public figure privilege in their Answer. Appendix, pp 119-120.

With discovery still incomplete, pending motions were heard before presiding Superior Court Judge James D. Llewellyn on January 21, 1988. At the hearing, the Petitioner moved that his Motion To Join New Defendants, Motion To Amend Complaint, Motion To Supplement Complaint be heard before the Motion For Summary Judgement of Respondents Roy H. Park Broadcasting Co., Inc. and Roy

Hardee was heard. Judge Llewellyn denied that motion and proceeded to hear the Motion For Summary Judgement. Before he presented evidence or argument at the summary judgement hearing, the Petitioner filed and served a written notice of voluntary dismissal of all of his claims against Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee, without prejudice. Judge Llewellyn entered an Order declaring the Notice Of Dismissal invalid. He found that the Petitioner had rested his case as to the summary judgement motion hearing before filing his Notice Of Dismissal. Record, pp 233-237. Appendix, pp 1-8. The Petitioner excepted from that ruling during the hearing on the grounds that North Carolina General Statute 1A-1, Rule 41 (a) allows him to take a voluntary dismissal without order of court at any time before resting his case, thereby raising an issue of due process of law and equal protection

under the laws pursuant to the 5th and 14th Amendments of the United States Constitution. Record, page 237. Appendix, p 8. On January 22, 1988, Judge Llewellyn entered an Order granting Summary Judgement in favor of Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee thereby raising another issue of due process of law and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution. Judge Llewellyn found that two news reports were protected by absolute privilege because they were the reporting of duly constituted judicial proceedings. Record, pp 239-242. Appendix, pp 9-13. He also found that two other news reports were protected by qualified privilege in that they were the reporting of a public concern and that the Petitioner had failed to show that such reporting was made out of actual malice. The Respondents have never

pled absolute privilege as to any news reports. That constitutional issue was first raised in their arguments seeking the entry of summary judgement and, as stated above, was decided in the Respondents' favor. Because he had not been told when the Trial court would rule on the Respondents' Motion For Summary Judgement, the Petitioner was not present when summary judgement was entered in open court. He later entered a timely Notice Of Appeal and exception to the Order entering Summary Judgement. Record, p 243.

On April 11, 1988, Judge Llewellyn denied the Petitioner's Motion For Relief From Orders which sought to have the hereinabove referred to Notice Of Dismissal declared valid and which sought to have the Summary Judgement in favor of Respondents Roy H. Park Broadcasting Co., Inc. and

Roy Hardee declared invalid, partly on the grounds that the entry of summary judgement based in part on absolute privilege as to news reports of judicial proceedings is prohibited by Article 1, Section 14 of the Constitution of North Carolina and violates the Petitioner's rights pursuant to the 1st, 5th and 14th Amendments of the United States Constitution.

On April 11, 1988, the Petitioner filed and served a Notice Of Dismissal, without prejudice, of all of his claims against Defendants Capital Cities-ABC, Inc. and Ned Warwick. On June 3, 1988, the Petitioner filed and served Notice Of Dismissal, without prejudice, of all of his claims against Defendant Willis Talton. On June 6, 1988, before Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee's Motion For Sanctions was heard, they dismissed, without prejudice, their counterclaim for

attorney's fees pursuant to N.C. Gen. Stat. 6-21.5. Following that dismissal, the only claim that had not been adjudicated in some form was Defendants Capital Cities-ABC, Inc. and Ned Warwick's claim for attorney's fees pursuant to N.C. General Statute 6-21.5.

On June 6, 1988 during the hearing of Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee's Motion For Sanctions pursuant to Rule 11 (a) of the North Carolina Rules of Civil Procedure, the Petitioner moved that a final judgement be entered. Judge Llewellyn denied that motion and made a determination that the Summary Judgement entered on January 22, 1988 was a final judgement at the time it was entered. Judge Llewellyn then allowed the Motion For Sanctions and awarded Respondent Roy H. Park Broadcasting Co., Inc. \$13,450.00 for attorney's fees. The Petitioner excepted from the Order entering sanctions in open court, thereby raising an issue as to due

process of law and equal protection of the laws. Record, pp 256-260. Appendix, pp 14-18.

The Petitioner filed and served a timely Notice Of Appeal to the North Carolina Court Of Appeals from Judge Llewellyn's Order entering sanctions. He also included in the notice his appeal from the following determinations of Judge Llewellyn: (a) Denial on June 6, 1988 of the Petitioner's oral motion that a final judgement be entered, (b) determination on June 6, 1988 that the Summary Judgement entered on January 22, 1988 in favor of Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee was a final judgement instead of being interlocutory, (c) the Order entered on January 22, 1988 granting interlocutory Summary Judgement to Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee, (d) the Order entered on

January 21, 1988 which declared the Petitioner's Notice Of Dismissal of his claims against Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee to be invalid, (e) denial on January 21, 1988 of Petitioner's oral motion that his Motion To Join New Defendants, Motion To Amend Complaint, Motion To Supplement Complaint be heard before the Motion For Summary Judgement of Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee was heard. Record, pp 264-266.

On June 20, 1988, the Respondents filed their Motion To Dismiss Appeal, pursuant to Rule 25 of the North Carolina Rules of Appellate Procedure. Judge Llewellyn refused to hear the motion. On August 4, 1988, the motion was heard by Judge John B. Lewis, Jr. He found that the only appeal which had been timely filed by the Petitioner was his appeal from the June 6, 1988

order of Judge Llewellyn entering sanctions against the Petitioner. No allegation or finding of fact was made as to the Petitioner having failed to properly prosecute his appeal after his Notice Of Appeal was entered. The Petitioner gave oral notice of appeal from Judge Lewis' Order at the hearing and then timely served a written Notice Of Appeal. On September 22, 1988, a hearing to settle the Record On Appeal in the first appeal was held before Judge Llewellyn. Many items (including all of the evidence) that were part of the Petitioner's Proposed Record On Appeal were deleted at the request of the Respondents and over the objections of the Petitioner. The Petitioner's Motion That Additional Portions Of Trial Court Record And Transcript Be Sent Up And Added To Record On Appeal in the first appeal (seeking to send up all of the evidence on file in the court below) was denied by the

North Carolina Court Of Appeals on October 13, 1988, the same date that the Record On Appeal was filed in the first appeal. On November 7, 1988, the Record On Appeal was filed in the Petitioner's second appeal, (appealing from the dismissal of most of his first appeal). On November 18, 1988, the North Carolina Court Of Appeals allowed the Respondents' motion that two video tapes be sent up and added to the records on both appeals. On November 30, 1988, the same Court denied the Petitioner's Request For Reconsideration Of Order Granting Defendant-Appellees' (Respondents) Motion To Add To Record On Appeal (seeking to have none or all of the evidence on file in the Court below added to the Record On Appeal in the first appeal and none added in the second appeal). On January 23, 1989, the Petitioner's Motion that first and second appeals be heard by the same panel of the

North Carolina Court Of Appeals was allowed.

On November 7, 1989, the North Carolina Court Of Appeals entered its Opinion which determined that the trial court committed reversable error by dismissing the Petitioner's appeal from the summary judgement entered in favor of the Respondents. The Court also determined that the materials before it were insufficient to determine whether or not the entry of sanctions against the Petitioner was in error. The order dismissing the Petitioner's appeal as to the January 1988 rulings was reversed and the case was remanded to allow the parties to prepare a new (third) record on appeal and briefs on the questions presented, including the appeal of the order of sanctions entered on June 6, 1988. In his Record On Appeal (third appeal) filed on February 14, 1990, the Petitioner excepted

to and assigned as error the trial court's Order declaring his Notice Of Dismissal invalid, Order entering summary judgement (based in part on absolute privilege as to two news reports of judicial proceedings) and Order entering sanctions, thereby keeping alive the earlier raised constitutional issues of absolute privilege and qualified privilege pursuant to Article 1, Section 14 of the Constitution of North Carolina and the 1st Amendment of the United States Constitution and the earlier raised constitutional issues of due process of law and equal protection of the laws, pursuant to the 5th and 14th Amendments of the United States Constitution. Record, pp 264-267. In his Brief and Reply Brief filed with the North Carolina Court Of Appeals, the Petitioner argues that the entry of summary judgement against him is contrary to North Carolina Constitutional law and quotes

Article 1, Section 14 of the North Carolina Constitution as supporting that contention. He also argues that the 1st and 14th Amendments of the United States Constitution prohibit absolute privilege as to news reports. In their Brief the Respondents argue that they are protected by absolute privilege as to some news reports. In his Brief, the Petitioner argues that the trial court's ruling that his Notice Of Dismissal is invalid, the trial court's entry of summary judgement and the trial court's entry of sanctions violates his rights to due process and equal protection under the laws pursuant to the 5th and 14th Amendments of the United States Constitution. Further, the Petitioner argues in his Brief that, should the North Carolina Court Of Appeals leave the Summary Judgement or sanctions in place, such will violate his rights to due process and equal protection of the laws,

pursuant to the 5th and 14th Amendments of the United States Constitution.

On February 5, 1991, the North Carolina Court Of Appeals filed its Opinion affirming the trial court's entry of Summary Judgement in favor of the Respondents, the trial court's entry of sanctions against the Petitioner (including \$13,450.00 in attorney's fees) and the trial court's determination that the Petitioner's Notice Of Dismissal was invalid because the Petitioner had rested his case at the summary judgement hearing when he filed the Notice Of Dismissal. Appendix, p. 19-54.

On March 11, 1991, the Petitioner timely filed his Notice Of Appeal (of right, asserted by Petitioner to involve substantial Constitutional questions) and his Petition For Discretionary Review addressed to the Supreme Court of North Carolina. In his Notice Of Appeal to that Court, the

Petitioner keeps alive the hereinabove referred to constitutional issues by referring to them, describing when and how they arose, describing how the 1st Amendment issues were ruled upon and by giving other details concerning what had previously been done to keep the constitutional issues viable. On April 5, 1991, the Supreme Court of North Carolina allowed the Respondents' Motion To Dismiss Appeal for lack of a substantial constitutional question and denied the Petitioner's Petition For Discretionary Review.

Appendix, pp 55-56.

On April 29, 1991, the Petitioner's application for a stay of enforcement of judgement, pending timely filing (and disposition of) his planned for writ of certiorari with this Court, was denied by Chief Justice William Rehnquist. On about May 20, 1991, the Petitioner's renewal of his Application (No. 805) seeking a stay of

enforcement of judgement, addressed to Justice Byron White and referred to this Court, was denied.

(b) Statement of the Facts:

Many of the facts relating to this appeal involve the proceedings and appear under Statement of Proceedings on pages 7-22 hereinabove. Additional procedural facts include the fact that, at the hearing of the Respondents' Motion For Summary Judgement on January 21, 1988, the Petitioner served his Notice Of Dismissal of all of his claims against the Respondents at 10:50 A.M. before (and instead of) presenting oral argument or evidence. After entering the Order declaring Petitioner's Notice Of Dismissal invalid, the Court offered to let the Petitioner present evidence and argument opposing the Respondents' Motion For Summary Judgement.

The summary judgement entered in favor

of the Respondents is based in part on absolute privilege as to news reports of duly constituted judicial proceedings and in part on qualified privilege as to news reports of matters of public concern, with the Court finding that the Petitioner had failed to show that those broadcasts protected by qualified privilege were made out of actual malice.

The entry of sanctions against the Petitioner did not occur until after summary judgement in favor of the Respondents was entered and the entry of sanctions was based at least in part upon the entry of summary judgment.

The facts forming the basis of the Petitioner's action against the Respondents are essentially as alleged in paragraphs 8-13, paragraphs 14-18 and paragraphs 21-22 of the verified Amended Complaint, Appendix, pp63-66, 66-69, 71-72 plus the related

statements alleged to be false or distortions of the truth contained in Attachments A, B, C and D of the Amended Complaint.

Appendix, pp 83-110. The Respondents pled that the publications complained of are true and therefore absolutely privileged.

Appendix, pp 121, 128. They never argued truth as a defense at any hearing in this action or in any brief or memorandum filed in this action. Instead, they have relied upon multiple types of privilege and upon the Affidavit of Respondent Roy Hardee declaring that the information was aired as fairly and honestly as possible under the circumstances available; that neither he nor any other employee of WNCT-TV had any doubts as to the truth and accuracy of the material contained in the broadcasts at issue or had any notice sufficient to raise such doubts as to the truth of the material

contained in the broadcasts, and declaring that Respondent Hardee and all WNCT-TV employees made reasonable efforts to verify the information supplied to them by their news sources, including the Petitioner, and believed at all times that the sources supplying information concerning the controversies were reliable, trustworthy and credible.

The Petitioner has pled that Respondent Roy Hardee knew, or should have known, at the time of the telecasts concerning which the Petitioner complains that some of the material contained in the telecasts falsely defame him. Appendix, p 64 (paragraph 9), p 65 (paragraph 11), p 67 (paragraph 15). The Petitioner alleges that the Respondents have an obligation to make a reasonable effort to report events complained of accurately and with reasonable fairness to all persons and other entities involved and that

they failed to do so. Appendix, pp 71-72 (paragraph 21). The Petitioner alleges that the failure was due at least partly to efforts to maintain or increase advertising revenues. Appendix, pp 71-72 (paragraph 21). The Petitioner alleges that Respondent Hardee's failure to fulfill his accuracy and fairness obligation was due partly to his disapproval of the Petitioner's refusal to accept Medicaid payment for medical services provided to Respondent Hardee's mother-in-law by the Petitioner. Appendix, p 72 (paragraph 21).

Because of what he considered to be slanted and unusual media coverage of a malpractice action, the Petitioner called Respondent Roy Hardee on November 3, 1985 and provided him numerous facts and details relating to the controversy surrounding University Nursing Center and the Pitt County Nursing Home Community Advisory Committee.

During the conversation, the Petitioner furnished Respondent Hardee with many of the details relating to the malpractice action which had recently been brought against the Petitioner and others by Josephine House. In his affidavit defending against summary judgement, the Petitioner testifies that, over a month before the telecasts relating to the Josephine House malpractice action, he told Respondent Roy Hardee that the patient had changed physicians one day after the incident alleged to have caused her fractured femur. Record, p 131. Further, he testifies that a few days after the telecasts Respondent Hardee indicated to the Petitioner that he remembered that the Petitioner had told him that the patient had changed physicians approximately 28 hours after the incident alleged to have caused her fractured femur (which was discovered about 3 weeks later). Record, p 149. In

his Affidavit, the Petitioner contends that any reasonable person who accepted the information that he gave Respondent Hardee to be the truth should have concluded that the Petitioner was almost certainly not guilty of medical malpractice in connection with a fracture of Josephine House's right femur that occurred at an unknown time, which may have occurred inside or outside of University Nursing Center and which may have been due to an injury or may have occurred spontaneously.

Record, page 132. The complained of telecasts of December 19-20, 1985 contained no reference to the Petitioner's contentions as to the facts relating to Josephine House's fractured femur. During each telecast, the Petitioner was accused of neglecting the patient over a 3 week period after the incident. The fact that the patient changed

physicians one day after the incident was not mentioned. During each telecast, a news reporter twice stated that Josephine House was seeking \$1.5 million in damages. The complaint in the Josephine House malpractice action states that Josephine House was seeking an amount exceeding \$10,000 and a second amount exceeding \$10,000 as punitive damages.

On the evening of February 17, 1986, the Petitioner briefed Respondent Hardee and WNCT-TV news reporters in considerable detail regarding the problem of decubitus ulcers in general and in regard to Clarence Ormond's ulcers in particular.

The Petitioner, in a letter to Respondent Roy Hardee dated March 4, 1986, requested that any future broadcast material concerning patient care by him be discussed with the Petitioner before being broadcast. The request was not honored and on August 22,

1986, without contacting the Petitioner, WNCT-TV telecasted a news report containing visual material which creates the false impression that the Petitioner was a defendant in the legal action that was the subject of the news report. Appendix, pp 68-69 (Amended Complaint, paragraphs 17-18).

In connection with each of his claims, the Petitioner contends that the acts and/or omissions of the Respondents which he alleges to be wrongful occurred due to actual malice on the part of the Respondents and with wanton and willful disregard for the rights of the Petitioner. Appendix, pp 73-74, 76-77 (Amended Complaint, paragraph 26, 32), Appendix, p 136 (Plaintiff-Appellant's Counterclaim, paragraph 3).

REASONS FOR ALLOWANCE OF

WRIT OF CERTIORARI

(a) The Affirmation Of Summary Judgement
Based In Part On Absolute Privilege Of

News Reports Of Judicial Proceedings
By The North Carolina Court Of Appeals
And The Dismissal Of The Petitioner's
Appeal From That Affirmation By The
Supreme Court Of North Carolina (For
Lack Of A Substantial Constitutional
Issue) Is In Conflict With Decisions Of
This Court Relating To Privilege, Pur-
suant To The 1st Amendment Of The
United States Constitution, Is In
Conflict With Decisions Of The Supreme
Court Of North Carolina And The North
Carolina Court Of Appeals, Pursuant
To Article I, Section 14 Of The Con-
stitution Of North Carolina And Is In
Conflict With Numerous Decisions In
Courts Of Last Resort In Many If Not
All Other States.

The Petitioner respectfully submits that this Court has never recognized any absolute privilege as to news reports of any

type. This Court did not embrace such absolute privilege in New York Times Co. v Sullivan, 376 U.S. 254, 84 S.Ct 710, 11 L.E. 2d 686 (1964), in Curtis Publishing Co. v Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967), in Rosenbloom v Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971), in Gertz v Robert Welch, Inc., 418 U.S. 323, 11 S.Ct. 2997 (1974), in Time, Inc. v Mary Alice Firestone, 424 U.S. 448, 96 S.Ct. 958 47 L.Ed. 2d 154 (1976) or in Dunn and Bradstreet, Inc. v Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985).

The Respondents have repeatedly argued that they are protected by absolute privilege as to news reports of judicial proceedings and repeatedly cited Scott v Statesville Plywood and Veneer Co., 240 N.C. 73, 81 S.E. 2d 146 (1954) as supporting that argument. Scott actually deals with allegations that defamatory statements were published by a

plaintiff filing them in a complaint and affidavit as part of court proceedings and by causing a related Notice of Summons and Notice of Attachment to be published, allegedly accusing the defendant (Scott) of fraud and conspiracy. Scott does not deal with news reports of judicial proceedings. The Notices published were part of the court proceedings and for that reason were ruled to be absolutely privileged, as were the court documents filed in that action. Even so, the Opinion of the North Carolina Court Of Appeals in this action cites Scott, supra., as supporting its determination that two news reports of judicial proceedings are protected by absolute privilege. Appendix, p 39. The Court Of Appeals Opinion also cites Burton v NCNB, 355 S.E. 2d 800 (1987) as supporting absolute privilege as to news reports of judicial proceedings. It is not clear why that Court cites its own Opinion

in Burton as supporting absolute privilege as to news reports of judicial proceedings in the instant case. No media publication was involved in Burton. The Court Of Appeals' Opinion in that case deals with a letter written by a bank's attorney to an alleged guarantor's attorney relating to a lawsuit the bank had brought against the alleged guarantor. The Court Of Appeals ruled that statements made in the letter were absolutely privileged because they had been published in the due course of a judicial proceeding and were not "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." (Citation omitted.)

The Opinion of the North Carolina Court Of Appeals in the case sub judice contains a number of other findings (in addition to the ruling of absolute privilege as to some news reports) which are surprising. In

connection with affirming the trial court's determination that the Petitioner's Notice Of Dismissal is invalid because he had rested his case when he filed the Notice, the Opinion states that the Petitioner cites no authority and makes no argument in his Brief regarding the Constitutional issues. For that reason the Court Of Appeals deemed that portion of the Petitioner's argument abandoned. On page 15 of his Brief filed with the Court Of Appeals, the Petitioner cites pages 45-50 of the verbatim transcript of proceedings at the January 21, 1988 hearing on Record On Appeal (and appended to the Brief) as showing clearly that the Petitioner had not rested his case when he served his Notice Of Dismissal. Further, findings of fact # 14-17 of the Order declaring the Notice Of Dismissal invalid, Appendix, pp 4-5, are also cited in the Brief as showing that the Petitioner had not rested his case. The Petitioner next

argues in his Brief that he had an absolute right to take a voluntary dismissal of his claims, at any time before he rested his case, pursuant to North Carolina General Statute 1A-1, Rule 41 (a)(1). (See page 6 above.) Next he quotes from that rule.

Plaintiff-Appellant's Brief, page 15-16. Then he argues that, by denying him his absolute right pursuant to North Carolina Statutory law, the trial court violated his Constitutional rights to due process and equal protection under the 5th and 14th Amendments of the United States Constitution. And he goes on to cite Maurice v Hatterasman Motel Corporation, Inc., 38 N.C. App 588 248 S.E. 2d 430 (1978), as not supporting a contention that the Petitioner had rested his case when he filed and served his Notice Of Dismissal. Plaintiff-Appellant's Brief, p 17. (In Maurice, a motion for summary judgement had been allowed and the judgement

had been signed but not filed when the plaintiffs filed their notice of voluntary dismissal with the clerk of court.) In his Reply Brief, pp 2-3, Petitioner argues that a party has not rested his case until he has exhausted all of the opportunities that are usually afforded to present evidence and/or argument at either a trial or a summary judgement hearing which proceeds to either submission to a trier of facts (jury or judge) in a trial or to submission of the matter to the court for determination as to summary judgement motions and cites Wesley v Bland, 92 N.C. App. 513, 374 S.E. 2d 475 at 477 (1988) as supporting that contention.

If arguing that a court ruling violates one's rights because a specific statutory law prohibits such a ruling and then arguing that entering the ruling contrary to the specific statutory law violates one's right to due process and equal protection of the laws,

pursuant to the 5th and 14th Amendments of the United States Constitution is not sufficient to keep Constitutional issues of due process and equal protection of the laws alive, just what does it take? Further, in Wesley, *supra*, the Petitioner served and entered his voluntary dismissal after the defendant rested his case. In the instant case, the Respondents rested their case, then the Petitioner inquired concerning what portions of his Affidavit the Court was going to strike pursuant to the Respondents' Motion To Strike. When the Court refused to specify what portions of the Affidavit he was going to strike, the Petitioner requested that he be allowed to testify under oath. (At that point in time, the Petitioner's deposition had never been taken in this action.) When that request was refused by the Court, the Petitioner then filed his Notice Of Dismissal (instead of utilizing the opportunity he had

ahead to present his forecast of evidence and argument). The Petitioner respectfully submits that there is no significant difference between Wesley and the instant case as to when the notices of dismissal were filed. Yet, the Court Of Appeals ruled that the dismissal in Wesley is valid and that the dismissal in the instant case is invalid.

Further, the Court Of Appeals' Opinion states that, in connection with his appeal from the entry of Summary Judgement, the Petitioner cites no authority and makes no argument as to his Federal Constitution allegations and that the Court deems that portion of the Petitioner's assignment of error abandoned. Appendix, p. 33. On pages 17-18, 20-24 of the Plaintiff-Appellant's Brief, the Petitioner argues that the entry of sumamry judgement is not supported by statutory law (N.C.G.S. 1A-1, Rule 41 (a) (1) and Rule 56 (c) in particular), that the

ruling of absolute privilege as to some news reports is in conflict with Article 1, Section 14 of the Constitution of North Carolina and that the ruling violates the Petitioner's right to privacy pursuant to the 1st and 14th Amendments of the United States Constitution, and his right to due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution. Further, he quotes Article 1, Section 14 of the Constitution of North Carolina. On pages 6-7 of his Reply Brief, the Petitioner argues again that Article 1, Section 14 of the Constitution of North Carolina prohibits absolute privilege as to any news reports and cites Yancey v Gillespie, 342 N.C. 227, 87 S.E. 2d 210 (1955) as supporting that argument. What else does it take to keep the Federal Constitutional issues alive, pursuant to the 1st, 5th and 14th Amendments?

In their Opinion, the North Carolina

Court Of Appeals appears to ignore the Petitioner's arguments that Article 1, Section 14 of the Constitution of North Carolina prohibits absolute privilege as to any news reports. Plaintiff-Appellant's Brief, p 23, Plaintiff-Appellant's Reply Brief, pp 6-7. Article 1, Section 14 states as follows:

Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

The Supreme Court Of North Carolina has held that the privilege granted by then Article 1, Section 20 of the Constitution of North Carolina was a qualified one. Yancey v Gillespie, supra. Then Article 1, Section 20 states:

FREEDOM OF THE PRESS. The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but

every individual shall be held responsible for the abuse of the same.

Clearly, then Article 1, Section 20 and present Article 1, Section 14 are similarly worded and both appear to grant a qualified immunity as to news reports.

The Petitioner has reviewed appellate opinions in more than 25 North Carolina cases alleging false defamation. Many of the opinions refer to the qualified privilege which partially protects the media as to false defamatory news reports. None of the opinions reviewed as much as suggest that news reports of judicial proceedings are absolutely privileged under North Carolina law. Further, the Petitioner has searched the American Law Review, Strang's North Carolina Index, the North Carolina Law Review and reviewed the opinions in about 15 false defamation cases filed in State courts other than North

Carolina or in Federal Courts. He has no reference or opinion, other than the one in the instant case, which supports absolute privilege as to any news reports in any jurisdiction in this country. Therefore, he respectfully submits that such absolute privilege does not exist in this country. Further, the Petitioner respectfully submits that, while the 1st Amendment of the Constitution of the United States protects freedom of the media, it also protects the rights of persons to be left alone (right to privacy, right to freedom from being maliciously falsely defamed); thereby making absolute privilege as to any news reports unconstitutional.

The Petitioner respectfully submits that, if absolute privilege as to news reports of judicial proceedings does not exist in North Carolina, his right to due process and equal protection of the laws,

pursuant to the 5th and 14th Amendments of the Constitution of the United States was clearly violated by the entry of summary judgement based in part on such absolute privilege. Further, if such absolute privilege does not exist, the entry of sanctions (including \$13,450 in attorney's fees) for having filed the Amended Complaint that was terminated by Summary Judgement based partly on absolute privilege, the Petitioner's right to due process of law and equal protection of the laws were again violated. Going further, the Petitioner respectfully submits that, if absolute privilege as to any news reports clearly does not exist in North Carolina, the entry of summary judgement based in part on such news reports, the affirmation of the judgement by the North Carolina Court Of Appeals and the dismissal of the Petitioner's appeal by the Supreme Court Of North Carolina raise a genuine issue as to whether the determination

that the Petitioner's Notice Of Dismissal is invalid, that determination's affirmation by the North Carolina Court Of Appeals and the Supreme Court Of North Carolina's refusal to review the determination all occurred due to prejudice; thereby violating the Petitioner's 5th and 14th Amendment right to due process of law and equal protection of the laws.

The Petitioner further submits that the Respondents destroyed their qualified privilege, if any existed, through abuse. However, he does not consider it feasible to present the forecast of evidence needed to support that contention within the confines of this petition.

(b) The Entry Of A Sanction Of Attorney's Fees, Pursuant To North Carolina General Statute 1A-1, Rule 11 (a) Needs To Be Closely Monitored And Settled By This Court Because Such

Sanctions Are Relatively New, Deeply
Involve One's Right Pursuant To The
5th, 14th And 7th Amendments Of The
United States Constitution And Can
Easily Be Employed By Incompetent Or
Severely Prejudiced Judges To Inflict
Unfair And Severe Injury Upon Unfavor-
ed Litigants.

Clearly, some deterrent needs to be in place to prevent frivolous litigation. One needs to look no further than In re Kunstler, 914 F. 2d 505 (4th Cir. 1990), to find a case in which the entry of a major monetary sanction (pursuant to Rule 11) is probably justified. On the other hand, one needs to look no further than this case to find one in which the entry of a major sanction (\$13,450) in attorney's fees is clearly not justified. As argued hereinabove under (a), the Petitioner was sent packing by the entry of a summary judgement against him based in

part on non-existent absolute privilege as to news reports of judicial proceedings. Then he was rocked and socked by the entry of sanctions for having filed the Amended Complaint eliminated by the Summary Judgment based in part on non-existent absolute privilege. The Summary Judgement was not entered until about 13 months after the Petitioner filed this action. If the Plaintiff's Complaint was indeed spurious, without foundation and a sham upon the court, why was it not dismissed long before the summary judgement hearing?

The Respondents pled truth, but they have never argued truth or established that any of the Petitioner's factual allegations are false. The Petitioner urges this Court to read his Amended Complaint. Appendix, PP 61-110. Absent a showing that its factual allegations are mainly false, the Petitioner respectfully submits that

considering the Petitioner's legal layman status, this Court will agree that the Complaint is not spurious, without foundation or a sham upon the court and that such a finding, its affirmation by the North Carolina Court Of Appeals and the refusal of the Supreme Court Of North Carolina to hear the matter strongly suggest that the Petitioner may have encountered at least a little bias along the way.

(c) The Petitioner Respectfully Submits
That This Court May Need To Reaccess
The Role Of Media Outlets In Informing
The Public And Further Submits That
Media Response To The Entry Of Summary
Judgement And The Entry Of Sanctions In
This Action Provides Insight As To The
Motives Of Many Media Outlets.

Before the Summary Judgement based in part on non-existent absolute privilege as

to news reports of judicial proceedings, several media outlets were anxious to report on several frivolous malpractice suits entered against the Petitioner in connection with a controversy which engulfed a nursing home where the Petitioner served as medical director and as an attending physician. After Summary Judgement based in part on non-existent absolute privilege as to news reports of judicial proceedings and sanctions based in part on the entry of Summary Judgement were entered, the previously anxious media outlets seemed to lose their interest in reporting on the Petitioner's stormy journey through the North Carolina Court System. During the last year, the Petitioner, feeling that publication of his experiences at the courthouse might be helpful as to clearing his name and protecting his rights, has approached more than twenty media sources seeking coverage as to court proceedings in

which he has been involved. None of them have shown any willingness to report on the odd adverse rulings (such as the entry of summary judgement based in part on non-existent absolute privilege) which the Petitioner has encountered. For example, Sixty Minutes was not interested. James J. Kilpatrick begged off. CNN did not reply to the Petitioner's letter. The Washington Post and The New York Times did not reply. The Washington Star indicated that it thought the Petitioner wanted it to publish information concerning Social Security inequities. About 12 North Carolina newspapers and 3 TV stations did not answer letters the Petitioner addressed to them. The Raleigh (N.C.) News And Observer (which on its own accord published a report relating to the malpractice action entered by Josephine House against the Petitioner and others that led to TV news reports which

part of this action is based upon), has been kept well informed by the Petitioner as to the unusual court rulings that have occurred. Not only has that newspaper refused to report the oddity of the court rulings, but it has refused to allow the Petitioner to comment on any of them in the People's Forum section of the newspaper. Further, the News And Observer recently refused to publish the Petitioner's letter to the editor in response to an article relating to Rule 11 sanctions entered against William Kunstler and Barry Nakell and which refers to the entry of summary judgement against the Petitioner based in part on non-existent absolute privilege and the entry of sanctions for having filed the Complaint upon which the Summary Judgement was entered. The newspaper claimed that it refused to publish the letter because it deals mainly with the

Petitioner's problems.

In view of the above, the Petitioner respectfully submits that media outlets which rush to the front seeking material to help fill their coffers with advertising and other revenues often turn stone silent when it appears that reporting the truth may hurt them or their media brothers.

The Petitioner respectfully submits that this Court may have inadvertently extended more protection to the media than is justified. If numerous media elements are going to ignore their responsibility to fairly publish news items and are going to selectively refuse to report on events because such reporting might enlighten the public concerning court rulings which mainly serve to protect them and/or other members of the media fraternity, it follows that such news outlets are clearly not performing

the public service envisioned by the framers of our Constitution and by this Court. Are many of our media outlets who take pride in being considered "reputable" really more interested in feathering their own nest than they are in fairly informing the public? If they are, do they really deserve the almost absolute privilege they now enjoy? Those questions are of much concern to the Petitioner. For about 35 years, he practiced family medicine, mostly in small towns. In the past he did home deliveries. He has made thousands of house calls. He has sincerely tried to provide good care for his patients. He never got rich along the way. He was awarded a Bronze Star and a Letter of Commendation with a Combat V while serving as a medical officer during the Korean War. And he did all of those things while seldom being allowed to shield himself legally through privilege. He respectfully

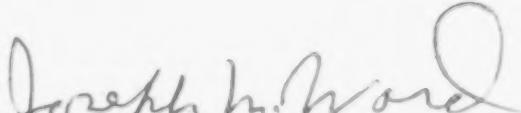
submits that, under such circumstances, he is entitled to some bitterness as to having been victimized by unfair media tactics.

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that the Court issue a writ of certiorari to review the dismissal of the Petitioner's Appeal by the North Carolina Supreme Court and the Opinion of the North Carolina Court Of Appeals affirming the trial court's entry of Summary Judgement, entry of sanctions against the Petitioner and determination that the Petitioner's Notice Of Dismissal is invalid. Further, the Petitioner respectfully requests that the Court reassess the status of Rule 11 sanctions to determine whether they are being improperly applied to discourage persons with limited resources as to seeking their day in court when their rights have been violated by someone higher in society's pecking order (usually someone wealthy). Still further,

the Petitioner respectfully submits that the media, through almost absolute privilege and by employment of legal technicalities, using high powered (and highly paid) attorneys, are being overly protected. He requests that the Court give some consideration as to reducing media protection and thereby leveling the playing field, at least a little.

Respectfully submitted, this the 2nd day of July, 1991.


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